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No. 76-924

In the Supreme Court of the United States

OCTOBER TERM, 1976

SAVE OUR INVALUABLE LAND (SOIL), INC., ET AL., PETITIONERS

v.

COLONEL WILLIAM R. NEEDHAM, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A48-A58) is reported at 542 F. 2d 539. The unreported decision of the district court is set forth at Pet. App. A1-A46.

JURISDICTION

The judgment of the court of appeals was entered September 29, 1976. By order of January 4, 1977, Mr. Justice White extended the time within which to file a petition for a writ of certiorari to and including January 3, 1977. The petition was filed on December 29, 1976. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the courts below correctly determined that the environmental impact statement in this case was adequate.

2. Whether the courts correctly held that the 1972 Amendments to the Federal Water Pollution Control Act, which became effective on October 18, 1972, did not apply to Hillsdale Dam for which Congress on August 25, 1972 had appropriated construction funds.

3. Whether the courts correctly found that assurances by state and local interests had satisfied the Water Supply Act of 1958.

STATEMENT

This is an action by certain area landowners and a conservation organization against officials of the Corps of Engineers and the Environmental Protection Agency seeking to stop construction of the Hillsdale Dam on Big Bull Creek, a tributary of the Marais des Cygnes River in Kansas. Big Bull Creek is a slow-moving creek with few riffles and long pools. The creek supports a medium quality fishery including channel catfish, flathead catfish and sunfish. Local wildlife is characterized by species of fairly widespread occurrence (Pet. App. A37-A38).

After construction, the conservation pool above the dam will be a lake having a surface area of 4,580 acres with 51 miles of shoreline. Among the project purposes are water quality, flood control, and water supply.

Petitioners alleged violations of the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, 42 U.S.C. 4321 *et seq.*; the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 817, 33 U.S.C. (Supp. V) 1252(b)(3); the Fish and Wildlife Coordination Act of 1958, 72 Stat. 564, 566, as amended, 16 U.S.C. 662 and 663; and the Water Supply Act of 1958, 72 Stat. 319, as amended, 43 U.S.C. 390b(b).

Both the district court, which issued 43 pages of findings of fact and conclusions of law, and the court of appeals rejected petitioners' arguments. First, the courts held that Section 102(b)(3) of the 1972 Amendments to the Federal Water Pollution Control Act, 33 U.S. (Supp. V) 1252(b)(3), did not apply to the Hillsdale Dam, because on August 25, 1972, Congress had appropriated funds to initiate construction of the dam, while the 1972 Amendments did not become effective until October 18, 1972; second, that the Corps' environmental impact statement complied with the requirements of NEPA; third, that there had been "reasonable assurances" by state and local interests that the water to be stored for future demand would be needed and its allocated cost paid within the life of the project (Pet. App. A50-A55).

ARGUMENT

1. The standard of review utilized by the courts below was proper. The district court conducted four days of full evidentiary hearings on the alleged deficiencies of the impact statement, and then determined that the statement was adequate. The court of appeals stated that it had carefully examined the record and agreed with the district court (Pet. App. A54).

Contrary to petitioners' contention (Pet. 10), no conflict among the circuits exists as to the applicable standards for review of the contents of an environmental impact statement. As the court of appeals held, "an EIS is to be tested by the concepts of 'good faith' and a 'reasonable' discussion of the five mandated areas of subject matter" (Pet. App. A54). See *Calvert Cliffs' Coordinating Committee, Inc.* v. *United States Atomic Energy Commission*, 449 F. 2d 1109, 1115 (C.A. D.C.); *National Helium Corp.* v. *Morton*, 486 F. 2d 995, 1001-1003 (C.A. 10), certiorari denied, 416 U.S. 993; *Environmental Defense Fund* v. *Corps of Engineers*, 470 F.

2d 289, 296 (C.A. 8), certiorari denied, 412 U.S. 931; *Lathan* v. *Brinegar*, 506 F. 2d 677, 693 (C.A. 9) (*en banc*). The determination by the court of appeals that the impact statement fully complied with the provisions of NEPA, based upon its careful review of the substantial record made in the district court proceedings, is essentially a factual matter which does not warrant further review by this Court.

2. The requirements of the Water Supply Act of 1958 were met. As regards future water supply the Act provides (43 U.S.C. 390b(b)):

> * * * That not to exceed 30 per centum of the total estimated cost of any project may be allocated to anticipated future demands where the State or local interests give reasonable assurances, and there is reasonable evidence, that such demands for the use of such storage will be made within a period of time which will permit paying out the costs allocated to water supply within the life of the project.

The court of appeals (Pet. App. A55-A56) agreed with the district court that the record establishes that the Corps was given "reasonable assurances" by state and local interests "that there will be a future demand for water which will permit paying out the allocated costs within the life of the project, and that there was 'reasonable evidence' to indicate that there would be such demand." Since two courts have resolved this factual question against petitioners, petitioners' attack on the sufficiency of the evidence (Pet. 21-22) does not justify further review by this Court.

3. The Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. (Supp. V) 1252, did not nullify Congress' prior approval of the construction plans for the project. With respect to Corps projects with storage for water quality control, the amendments require the

Administrator of the Environmental Protection Agency (EPA) to evaluate the need for, the value of, and the impact of the storage for the water quality control aspect of the project. Such evaluation is required to be included in all reports "to Congress *proposing authorization or construction* of any reservoir including such storage" (emphasis added).

The Hillsdale Reservoir was under study for many years. Congress authorized construction and appropriated construction funds on August 25, 1972 (Pet. App. A 3, A26, A29). The FWPCA Amendments became effective on October 18, 1972 (Pet. App. A27). EPA had interpreted the FWPCA as not requiring an evaluation by the Administrator for projects as to which construction has been authorized and construction funds appropriated prior to October 18, 1972 (Pet. App. A29, A34). Congress has been advised of EPA's interpretation and has acquiesced therein by continuing to appropriate funds for the project (Pet. App. A34-A35).

The decision of the court of appeals declining to give the FWPCA retroactive effect is thus correct. *Cape Henry Bird Club* v. *Laird*, 484 F. 2d 453 (C.A. 4), affirming 359 F. Supp. 404 (W.D. Va.).

4. There has been full compliance with the requirements of the Fish and Wildlife Coordination Act of 1958. The Fish and Wildlife Coordination Act, 16 U.S.C. 663(a), requires that "adequate provision consistent with the primary purposes" of the project "shall be made for the use thereof, together with any areas of land, water or interests therein, acquired or administered by a Federal agency in connection therewith, for the conservation, maintenance and management of wildlife resources thereof, and its habitat thereon * * *." Under Section 663(c) additional land *may*

be acquired for wildlife conservation purposes, if authorized by Congress either before *or after* the project itself is authorized. Thus, not only is acquisition of additional lands not mandatory, such acquisition depends on specific congressional authorization. 16 U.S.C. 663(c).

Petitioners' contention that the Corps of Engineers did not adequately consult with other agencies is refuted by the district court's finding that the Corps consulted "extensively" with such agencies (Pet. App. A38, A39).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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